IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1258

STATE OF MINNESOTA, BY WARREN SPANNAUS, Its Attorney General,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Respondent.

No. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

MOTION OF THE MINNESOTA AFL-CIO FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND

BRIEF OF THE MINNESOTA AFL-CIO, AS AMICUS CURIAE, IN SUPPORT OF THE STATE OF MINNESOTA

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The Minnesota AFL-CIO respectfully moves this Court for leave to file a brief in this case as *amicus curiae* in support of the State of Minnesota. The consent of the attorneys for Petitioners herein has been obtained, but the attorney for Respondent herein refused to consent to the filing of a brief by the Minnesota AFL-CIO as *amicus curiae*.

The applicant, Minnesota AFL-CIO (hereinafter the "State Federation"), is composed of over 184,000 members from various local labor unions throughout the state. One of its purposes as a registered lobbyist is to lobby in the Minnesota legislature for passage of laws that are of benefit to its members. The adoption of Minn. Stat. §48.185 which limits the interest rate allowable on open end loan accounts to 12% was vigorously supported by the State Federation as a consumer protection measure.

The State Federation will be directly affected by this Court's decision in the present case. The Minnesota Supreme Court, relying on a decision of the Court of Appeals for the Eighth Circuit, held that the respondent, First of Omaha Service Corporation, could charge customers in Minnesota which it had solicited for its BankAmericard program the 18% annual interest rate allowed by Nebraska law.

The petitioner herein, the State of Minnesota, will argue that protection of its citizens from usury is a traditional exercise of its police powers, but the discussion of the concerns of a consumer interest group, as is the State Federation, is not likely to be adequate.

The State Federation has an interest in seeing that the Minnesota law which it supported be preserved.

Moreover, it has an interest in preserving a system in which it has legitimate political influence. If the decision of the Court below is not reversed, a law enacted by the Nebraska legislature will determine the interest rates charged to respondent's Minnesota customers. A consumer interest group in Minnesota has no voice in the legislatures of other states. The effect is to deprive the State Federation of a forum in which to advance its members' interests with respect to interest rates charged by out-of-state national banks. Similarly, no such organization in any other state could influence what a Minnesota national bank could assess on loans it makes out of state. Preservation of a system in which state citizens have some voice in local affairs is of utmost concern to the State Federation.

Applicant has no reason to believe that the argument on these points will be expanded and be made complete in this Court. If the State Federation's argument is approved by this Court, the decision of the court below must be reversed.

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SUBJECT INDEX

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

Statutes:

Cases:

Miscellaneous:

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BRIEF OF THE MINNESOTA AFL-CIO, AS AMICUS CURIAE, IN SUPPORT OF THE STATE OF MINNESOTA

By leave of the Court, the Minnesota AFL-CIO files this brief as *amicus curiae*.

THE INTEREST OF THE MINNESOTA AFL-CIO, AMICUS CURIAE

The Minnesota AFL-CIO (hereinafter the "State Federation") will be directly affected by this Court's decision in the present case, as it is a registered lobbyist in the State of Minnesota and supported the enactment of Minn. Stat. §48.185 which limits the annual interest rate on open end loan account arrangements to 12%. If the decision of the court below is not reversed, this law will be ineffective for setting the interest rate charged by national banks which are located in states which allow a higher rate. Moreover, the State Federation will have lost its legitimate political influence concerning a local matter, as usury laws are traditionally the function of state law, and it is powerless to influence the legislation of any other state.

If the decision below is reversed, the efficacy of the State Federation's lobbying on behalf of its members for consumer protection legislation will be preserved.

QUESTION PRESENTED

Does Section 85 of the National Bank Act, 12 U.S.C. §85, allow a national bank located in Nebraska to charge an interest rate allowed by Nebraska law but in excess of that allowed by Minnesota law on loans made in Minnesota?

STATUTES INVOLVED

The pertinent statutes are:

12 U.S.C. §85 (App. A-19); and
Minn. Stat. §48.185 (1976) (App. A-20).

ARGUMENT

I.

THE MINNESOTA SUPREME COURT'S INTERPRETATION OF SECTION 85 OF THE NATIONAL BANK ACT ADVERSELY AFFECTS MINNESOTA CONSUMERS.

A. Interpretation of Section 85 Which Allows Out-State National Banks to Export Their Interest Rates Discriminates Against Local National Banks.

The Minnesota Supreme Court has ruled that a national bank located in Nebraska may charge its Minnesota credit card customers the interest rate on unpaid accounts allowable under Nebraska law or Minnesota law, whichever is higher. *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, — Minn. —, 262 NW2d 358 (1977) (App. A-1). Nebraska law allows national banks located there to charge one and one-half percent per month on unpaid accounts, Nebr. Rev. Stat. §8-820. Minnesota law allows national banks located there to charge one percent per month on unpaid accounts, Minn. Stat. §48.185. As a result of *Marquette, supra,* national banks located outside of Minnesota but engaged in extending credit in Minnesota are permitted to charge eighteen percent interest per annum while national banks located in Minnesota are permitted to charge only twelve percent interest per annum on similar loans made in Minnesota.

As pointed out *infra*, this result is unsupported either by the language or by the legislative history of Section 85. The impact of the decision, however, is not confined to competitive discrimination against local national banks; Minnesota consumers, credit customers and depositors are also affected, as is the State Federation, which has lobbied intensively for consumer protection, including usury legislation.

B. The Probable Effect of Such Discrimination Is To Diminish the Availability of Credit to Consumers at Interest Rates Allowed by Minnesota Law.

While national banks in Minnesota can avoid the adverse impact of the *Marquette* decision, Minnesota consumers, credit customers and depositors cannot. The future policy of local national banks is foreseeable: first, make fewer loans in Minnesota, and second, make arrangements, or become affiliated, with service corporations or national banks located in states allowing higher interest rates. Diminishing availability of credit at interest rates allowed by Minnesota law will result. Increasing credit costs may reduce consumer credit transactions; the reduction in consumer credit expenditures could cause loss of employment opportunities for Minnesota residents. To the extent that local national banks cannot circumvent the Minnesota statute, fewer loans may be made in Minnesota, thus Minnesota residents may find their deposits used to finance growth in other states.

C. The Ruling Below Deprives Minnesota Consumers of the Protection of the State's Usury Laws With Respect To Any Type of Loan.

Minnesota has long followed the policy of regulating interest rates to protect its citizenry from excessive credit cost. Money is a commodity; interest charges are a form of rent on its use, but a lender with the money to relieve the wants of a borrower is in a dangerously powerful position. Fear of oppression led to ancient religious prohibitions on exacting interest on loans. Modern usury laws have been enacted for the same humanitarian purpose. The Minnesota Supreme Court has voiced the protective purpose behind the state's usury laws:

> As early as 1717 the colony of New York enacted a law against usury with a penalty of treble the value of the money lent. . . .
>
> Our usury statutes are undoubtedly patterned after the provisions of the New York code. They are the result of legislative efforts to curb the practice of extorting from necessitous borrowers excessive rates of interest.

Blindman v. Industrial Loan and Thrift Corporation, 197 Minn. 93, 101, 102, 266 N.W. 455, 459 (1936) (Loring, J., dissenting).

Minnesota consumers and the State Federation were instrumental in the adoption of Minnesota's current statutory framework. After *Marquette*, however, consumers are deprived of the protection of Minnesota law limiting interest charges on bank credit cards. Indeed, under the Minnesota Supreme Court's interpretation of Section 85, there is nothing to prevent a non-resident national bank from

exporting the interest rates allowed by its home state on other types of loans, if they happen to be higher than those allowed in Minnesota. This result obtains not because Minnesota law conflicts with federal law, nor because Minnesota has attempted to legislate in favor of its state chartered financial institutions; but because it has attempted to protect its citizens in a fashion in which another state has not. If any state allows an interest rate higher than that allowed by Minnesota, a national bank located in such state may, consistent with the ruling below, charge Minnesotans such higher rate. The protection Minnesota may offer its citizenry is thus reduced to the level of the lowest common denominator. Surely, this result is unattributable to Congress.

Competition alone cannot be relied upon to protect the consumer where money is the commodity being sold. In the sale of this commodity, another dimension is added. That is, the relative risk in measuring the buyer's ability to repay, which is not involved in the sale of other products or services. In buying other products and services, the buyer would select the lowest price. In purchasing or renting money, the seller may not be willing to sell to a particular buyer at the lowest price, because the risk of not being repaid is too high.

Certainly credit is a mainstay of a viable, growing economy; but not credit extended which results in an inordinate amount of repossessions, foreclosures, uncollectible debts, and the disappointments, cost and problems that follow those results. The value judgment as to what should be the highest price for renting money should be left to each state legislature.

D. This Interpretation of Section 85 Denies Minnesota Consumers and the State Federation The Opportunity To Protect and Advance Their Interests.

Congress has not attempted to regulate interest rates for each and every type of loan made in the nation. Indeed, the alternative rates of interest allowed a national bank under Section 85, the higher of the state allowed rate or one or five percent above the discount rate in the Federal reserve district, contemplate that interest rates may differ, regionally or locally. Whether this policy of allowing for locally or regionally differing interest rates is constitutionally mandated or the result of Congress' considered judgment is immaterial; under either rationale, the local nature of interest rate limitations is recognized. Yet, after *Marquette,* Minnesota residents, and their registered lobbyists such as the State Federation, can only obliquely affect such matters of local concern. Since Minnesota residents and lobbyists have little influence in other states' legislatures, and since Congress has already indicated its unwillingness to deal with interest rates on a national level, Minnesota residents and the State Federation are, as a practical matter, denied the opportunity to protect and advance their interests with respect to interest rates on loans made by non-resident national banks, regardless of the amount of business transacted in Minnesota by such banks. This result, likewise, could not have been contemplated by Congress in adopting the National Bank Act.

II.

SECTION 85, AS EVIDENCED BY ITS LEGISLATIVE HISTORY, IS MEANT TO PROHIBIT STATES FROM DISCRIMINATING AGAINST NATIONAL BANKS IN FAVOR OF LOCAL FINANCIAL INSTITUTIONS, AND SHOULD NOT BE INTERPRETED TO PROVIDE AN ADVANTAGE FOR OUT-OF-STATE NATIONAL BANKS IN COMPETITION WITH LOCAL NATIONAL BANKS.

A. The Decision Below Should Be Reversed as it Frustrates the Congressional Purposes of Competitive Equality and State Authority Underlying Section 85.

The adverse implications of the Minnesota Supreme Court's decision mentioned above will not result if this Court applies an interpretation of Section 85 which is consistent with Congressional intent. When Congress adopted this statute more than one hundred years ago, the activities of a national bank were restricted to one location. *Citizens & Southern National Bank v. Bougas*, — U.S. —, 98 S.Ct. 88 (1977). Although there is no legislative history concerning the precise issue in this case—whether a national bank can charge the interest rate allowed by the state in which it is located wherever it does business—there is convincing evidence that Congress intended national banks be subject to state law with respect to interest rates.

Congressional debates in 1864 centered first on whether one interest rate should be set for all national banks or whether individual states should remain free to control the interest rates of national banks located there. Senator Sherman from Ohio favored a uniform rate of interest, but was overruled on that point. Cong. Globe, 38th Cong., 1st Sess. 2123 (1864). After it was decided to allow state law to control interest rates, the discussion turned to the fear of discrimination by states against national banks. Senator Sherman stated:

> . . . I prefer now to place the national banks in each state on precisely the same footing with individuals and persons doing business in the State by its law.

Cong. Globe, *supra*, at 2126. The concern with potential discrimination resulted in the language of the clause of Section 85 which excepts a national bank from the interest rate allowed by the laws of the state where a different rate is limited for state banks. However, no Congressman suggested his intent was to allow one state to adopt a usury law that would be binding on other states. In fact, Senator Trumball from Illinois stressed the right of each state to establish its own usury law, when he remarked:

> This provision [Section 85] of the bill is not an interference with the States, but on the other hand an agreement with the States. It allows the same rate of interest in a state which is allowed by the laws of the State. I think if any good is to arise from these banking institutions [national banks], the law should be so formed that they may be established in all parts of the country; and it is no interference with State authorities, or with the authority of the different states to control this rate of interest. The State of Kansas may do it or the State of Iowa, or the State of Illinois, or any state, and there can be no complaint by the people of these States if it is left to the control of their legislatures . . .

Cong. Globe, *supra*, at 2124. The intent was to leave control of the rates of interest to the separate state legislatures.

One direct effect of the decision below is to deprive the Minnesota legislature of its heretofore unquestioned authority to control certain interest rates. If the decision below is allowed to stand, not only will the action of the Minnesota legislature in drafting and adopting Minnesota Statute §48.185 be completely meaningless, but so will the lobbying activities of the State Federation in favor of the 12% annual interest rate allowed in that state law. The state's control over usury law would be severely limited. Its law would be binding only on national banks located within Minnesota lending money locally, not on national banks from other states which choose to allow a higher rate of interest. The effect of the decision below is to *create* discrimination, contrary to the meaning of Section 85, not between state and national banks, but between out-of-state national banks which can import a higher interest rate and local national banks which are limited to the interest rate set by Minnesota law. As Justice Scott cautioned in his dissent below:

> "The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act."

Marquette National Bank v. First of Omaha Service Corporation, — Minn. —, 262 N.W.2d 358, 365 (Scott, J., dissenting) (App. A-18).

Because the Congressional intent of competitive equality for national banks and of individual state control over

usury laws would be frustrated by the interpretation rendered by the court below, its decision should be reversed.

B. The Decisions Upon Which the Minnesota Supreme Court Relied Ignored the Legislative History of Section 85 and Failed to Scrutinize the Implications of Their Interpretations.

The Eighth Circuit decision in *Fisher v. First National Bank of Omaha,* 548 F. 2d 255 (8th Cir. 1977) upon which the Minnesota Supreme Court relied was itself summarily based on the Seventh Circuit decision of *Fisher v. First National Bank of Chicago,* 538 F. 2d 1284 (7th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977). The Eighth Circuit opinion does not include a discussion of the legislative history of Section 85, the Congressional intent behind the law, or the probable implications of its interpretation. Thus, an analysis of the Seventh Circuit opinion which set the precedent for the law's disputed interpretation is necessary.

The issue presented to the Seventh Circuit was what law governed when an Illinois-located national bank did business in Iowa. The district court felt the permissible rate would be defined by the laws of the state in which the borrower is situated, and since Iowa's Small Loans Act allowed 18% annual interest, the defendant had not charged a usurious rate. The Court granted a motion to dismiss for failure to state a claim upon which relief could be granted and the plaintiff appealed. The Circuit Court affirmed the decision after reaching the same conclusion as the district court. However, that court held that Illinois law controlled based on the plain meaning of Section 85.

The Seventh Circuit decision granted a preferred status to a national bank which permitted it to charge the higher of the interest rates allowed in the state where it is located or in the state where it does business.

The Seventh Circuit interpretation frustrates Congressional intent for the reasons mentioned above. Moreover, that court had less reason to give close scrutiny to its interpretation since both Iowa and Illinois usury laws permitted the 18% annual interest that was charged. In the present case, however, the implication is much clearer. Minnesota's legislature, consumers and national banks will be forced to accept Nebraska's usury law when a national bank located there lends money in Minnesota. The outcome is a shock to common sense and finds no support from the legislative history of Section 85 or from any prior judicial interpretation of that statute.

In an earlier decision, *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969), a different conclusion was reached in a well-reasoned opinion. The federal district court held that a loan made in Louisiana by a New York national bank was governed by Louisiana usury law. Pointing out that national banks are not totally above the state laws, the court found that the purpose of Section 85 is served only by limiting the effect of the section to loans made in the state where the bank is located. Judge Heebe set forth the following reasons:

> Otherwise, a national bank located in a state with a very stringent interest rate would be placed at a severe disadvantage when it made loans outside of the state. In such a situation the purpose of the statute—to put national banks on an equal par with the state banks against which they compete—is frustrated if

> the national banks are restricted to the interest rate in the states where they are located. On the other hand, we do not think Congress intended this provision to serve as a haven for national banks which, located in states with little or no restrictions as to the interest rate, charge interest on loans made in other states in excess of that allowed by the laws of those states. This, too, would frustrate the congressional purpose of equality between national and state banks regarding the interest rate.

Meadow Brook National Bank v. Recile, supra, 302 F. Supp. at 74. Since competitive equality between lenders is the purpose behind the law, the court found its decision was supported by the statute.

In prospect an unusual result could follow an affirmation of the Minnesota Supreme Court's decision. Legislatures of various states may race to see which can provide the most attractive (i.e., high) interest rate for open end credit in an effort to entice national lending institutions to engage in business in that particular state.

The State Federation lobbied vigorously on behalf of its members to have Minn. Stat. §48.185 enacted. It is of the opinion that a 12% annual interest charge on open end accounts is protective consumer legislation. Congress believed that certain control over usury laws should be delegated to the separate states when it enacted Section 85. The two laws are not inconsistent. Rather, the question is which state law should control when Minnesota borrowers are extended credit from an out-of-state national bank. Congress' intent to promote equality between banks and to leave authority to the states will be furthered by a reversal of the decision below. A law which the Min-

nesota legislature adopted under authority reserved for the state and in hopes of protecting its consumers should not be preempted by a Nebraska law, over which it has no control.

CONCLUSION

For all of the reasons which have been stated, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

No. 250 Hennepin County
Todd, J.
Concurring specially,
Sheran, C. J.
Dissenting, Scott, J.,
Yetka, J., Wahl, J.

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA, intervenor,

Respondent.

Endorsed
Filed November 10, 1977
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

A national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Reversed.

Considered and decided by the court en banc.

OPINION

TODD, Justice.

The Marquette National Bank of Minneapolis (Marquette) sought to enjoin the First National Bank of Omaha (Omaha Bank) and its wholly-owned subsidiary, First of Omaha Service Corporation (Omaha Service) from issuing BankAmericard credit cards to the State of Minnesota. The Omaha Bank program assessed customers an annual interest rate of 18 percent on unpaid balances of less than $1,000, to be computed upon the prior month's balance of the individual account. The Minnesota Credit Card Act (Minn. St. 48.185)[1] sets a maximum interest rate of 12 percent per annum with the interest charge to be based on an amount no greater than the average balance of the individual account for the prior month. As a result of procedural actions, Omaha Service remains as the only defendant, but the matter was considered as though the Omaha Bank still remained as a defendant. The district court entered judgment permanently enjoining Omaha Service from soliciting BankAmericard customers on behalf of the Omaha Bank in Minnesota in contravention of the provisions of Minn. St. 48.185. We reverse.

[1]Minn. St. 48.185 provides in pertinent part: "Subd. 3. A bank or savings bank may collect a periodic rate finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

"Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

"(a) Annual charges, not to exceed $15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank."

Prior to the hearing on the matter, the parties agreed to a stipulation of facts which provides:

"I.

"The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card issuing member in the BankAmericard plan, and as such has issued (prior to the restraining order) and intends to issue * * * BankAmericard credit cards to Minnesota residents who qualify for them.

"II.

"Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III of this Stipulation.

"III.

"Defendant First of Omaha Service Corporation will participate in the system by entering into agree-

ments with Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. * * * While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

"IV.

"The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks. * * *

"V.

"Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the

signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant to his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

"VI.

"The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1-1/2% per month on the first $999.99 of the customers account for an annual percentage rate of 18%, and 1% a month on amounts of $1,000 and more for an annual percentage rate of 12%, * * * [T]he finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchases portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

"VII.

"The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

"VIII.

"The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraph III and IV of this Stipulation in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates will be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI of this Stipulation. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Secs. 8-815—8-823, —8-825—8-829, as added by Laws 1969, Chapter 31 (L.B. No. 52) as amended, and other laws of Nebraska, which the defendant First of Omaha Service Corporation

contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. §85.

"IX.

"The plaintiff The Marquette National Bank of Minneapolis ('Marquette') is asking for temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185.

"X.

"Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them. * * *

"XI.

"Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a $10 annual charge for the privilege of using the card and, in addition a finance

charge equal to 1% per month (12% annual percentage rate). * * * [T]he finance charge of 1% per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's amount during each monthly billing cycle, except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the amount is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance."

The procedural history of this case is significant. Marquette originally commenced an action in Minnesota district court against the Omaha Bank, Omaha Service, and the Credit Bureau of St. Paul, Inc., alleging violations of the Minnesota Credit Card Act (Minn. St. 48.185), and the Minnesota Deceptive Trade Practices Act (Minn. St. 325.772); and seeking money damages and injunctive relief to restrain the defendant from solicitation in Minnesota for defendant's BankAmericard program. Since the Omaha Bank was a national bank, the case was removed to the United States District Court for Minnesota pursuant to 28 USCA, §1441. Marquette thereafter dismissed Omaha Bank as a party defendant, resulting in the case being remanded back to the state district court because of a lack of Federal subject matter jurisdiction.[2] The case then proceeded solely against Omaha Service. However, because

[2]If Marquette had not dismissed the Omaha Bank as a party defendant, the case would have undoubtedly been transfered to the United States District Court for Nebraska since a national bank can only be sued in the forum where it is established. See, Radzanower v. Touche Ross & Co. 426 U. S. 148, 96 S. Ct. 1989, 48 L. ed. 2d 540 (1976).

Omaha Service's function is limited to entering into agreements with merchants and local banks, and, since it does not have control over the issuance of credit cards or establishing the rate of finance charge, the case was treated as if the Omaha Bank was still the defendant.

The district court issued a permanent injunction against Omaha Service prohibiting the "solicitation of residents of the State of Minnesota or other activity in connection with * * * the operation of a bank credit card program" which violates Minn. St. 48.185. In issuing the permanent injunction, the court held that while Federal law prevents states from enacting laws which discriminate against classes of lendors, it does not preclude states from discriminating against classes of loans. The principal issue presented on appeal is whether a state may regulate, by statute, the credit card interest rate charged by a national bank located in another state but conducting business within the regulating state.

National banks are regulated by the United States Congress. The amount of interest which a national bank may charge its customers is governed by 12 USCA, §85, which provides in part:

> "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, *interest at the rate allowed by the laws of the State, territory, or District where the bank is located,* * * *." (Italics supplied.)

The application of this section to interstate credit transactions has been recently considered by both the Seventh and Eighth Circuit Courts of Appeals. In Fisher v. First

National Bank of Chicago, 538 F. 2d 1284 (7 Cir. 1976), certiorari denied, 429 U.S. 1062, 97 S.Ct. 786, 50 L. ed. 2d 778 (1977), the court addressed a situation in which a national banking association with its principal place of business in Illinois was charging Fisher, an Iowa resident, interest on the unpaid balance of his monthly BankAmericard statement at a rate allowable in Illinois. Fisher brought an action alleging that the Illinois bank was charging usurious interest to Iowa residents under its BankAmericard program. In permitting the Illinois bank to assess Illinois interest rates to Iowa resident users of the credit card, the court of appeals stated (538 F. 2d 1289):

> "* * * The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest 'allowed by the laws of the State' of Illinois. If we could stop there and only look at the first portion of §85, we could easily conclude that the 18% per annum rate of interest allowed by the Illinois Revolving Credit Act, Ill. Rev. Stat., ch. 74, §4.2 (1973), governs the rate chargeable by the defendant within Illinois and anywhere else that it might do business. The language is certainly broad enough to bear that interpretation. It refers to the interest on 'any loan or discount made' as being governed by the laws of the single state where the national bank can be located.
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> "* * * The crux of this case is what law governs when the Chicago-located national banking association does business in another state, here Iowa. * * *
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> * * * * *

> "We would summarize the statute as it applies to this case as follows: Illinois' 18% per annum statute applies to *all* loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is 'existing' in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa."[3]

After the action against the Illinois bank was in progress, the same plaintiff brought an almost identical action against the First National Bank of Omaha, challenging its right to charge Iowa resident customers of the Omaha BankAmericard program interest rates allowable in Nebraska. In Fisher v. First National Bank of Omaha, 548 F. 2d 255, 257 (8 Cir. 1977), the court of appeals, in denying the plaintiff's claim, stated:

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[3]But see, Meadow Brook National Bank v. Recile, 302 F. Supp. 62, 73 (E. D. La. 1969), in which the court reasoned: "In effect, 12 U.S.C. § 85 provides that a national bank may charge interest at the rate allowed by the laws of the state where the bank is located. The question is whether this was meant to fix the rate of interest on *all* loans made by the bank or merely those loans made in that state. Admittedly, the above quoted language would seem to include all loans made by the bank and not solely those made in the state where the bank is located. * * *

* * * * *

"We hold that 12 U.S.C. §85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state."

This reasoning was disapproved by the Seventh Circuit in Fisher v. First National Bank of Chicago, 538 F. 2d 1284, 1290 (7 Cir. 1976), certiorari denied, 429 U. S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977): "We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on 'any loan' is governed by the rate allowed by the state 'where the bank is located,' which in this case is Illinois."

"* * * The question is whether under the National Bank Act we are required to apply the law of Nebraska or the law of Iowa to transactions which were initiated in Iowa but consummated in Nebraska. * * *

"* * * We are persuaded, however, that it really makes no difference whether the transactions are characterized as being Nebraska transactions or whether they are characterized as Iowa transactions.

"In the very recent case of *Fisher v. First Nat'l Bank of Chicago,* 538 F. 2d 1284 (7 Cir. 1976), it was held that under the provisions of §85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.

"We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

Thus, we have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota,

has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher. At this point, the procedural history of this case assumes a greater importance. It appears fairly obvious that if the Omaha Bank had remained as a party defendant, the Federal District Court for Minnesota or for Nebraska would have followed the opinion of the Eighth Circuit. By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system.

In reaching a decision to enjoin Omaha Service and, in practical effect, the Omaha Bank from operating their BankAmericard program in Minnesota in violation of §48.185, the district court sought to distinguish the two Fisher cases. In a well-reasoned memorandum accompanying its order, the district court discussed and interpreted the Fisher cases in light of the factual situation of the present case and determined those cases to be inapplicable as there did not exist a statute setting a credit card rate of interest in any of the states involved. The court concluded that while 12 USCA, §85, precludes states from discriminating against lendors as a class, it does not prohibit a state from establishing classes of loans which are applied uniformly to all banks doing business in the state. If we were writing on a clean slate, this reasoning would appear to be more consistent with the history and purpose of the National Bank Act.

The particular section of the National Bank Act under consideration in this case has been in existence for over a

century. Obviously, the ramifications and problems resulting from bank credit card financing could not have been considered by Congress at the time of its adoption. Furthermore, a rather strong argument can be made that credit card financing is not purely banking business even though a bank may administer the program. The original version of the National Bank Act was enacted by Congress to protect national banks from discriminatory economic legislation by individual states in which the various national banks were located. The result of the Federal legislative efforts was to create what has commonly been referred to as a "most favored lendor status" for national banks. First National Bank in Mena v. Nowlin, 509 F. 2d 872, 879 (8 Cir. 1975); United Missouri Bank of Kansas v. Danforth, 394 F. Supp. 774, 779 (W.D. Mo. 1975). In the landmark case of Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409, 21 L. ed. 862 (1874), the laws of Missouri limited the amount of interest chargeable by banks organized under state laws to 8 percent but allowed all other persons in the state to assess a 10-percent interest charge upon credit transactions. Within this statutory scheme a national banking association organized and located in the State of Missouri charged its credit customers a 9-percent interest rate which was alleged to be usurious. In an early interpretation of virtually identical statutory language to that employed in 12 USCA, §85, the Supreme Court held that the National Bank of Missouri could lawfully charge its customers a 10-percent interest rate and reasoned (85 U.S. [18 Wall.] 412, 21 L. ed. 683):

> "* * * Coupled with the general spirit of the act, and of all the legislation respecting National banks,

it is controlling. It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the states allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favor-

> ites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks."

The decisions reached in the Fisher cases injected a new attribute into the "most favored lendor status," which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs. This result is accomplished despite the fact that the individual state has attempted to specifically limit the interest rates allowable on certain loan transactions and its laws apply uniformly to all lending institutions within the state. Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, an advantage which appears to be contrary to the original pcrpose in adopting this particular section of the National Bank Act.

However, we deem it inappropriate for this court to permit the use of procedural devices to obtain a result inconsistent with the existing doctrine in the Eighth Circuit. Consequently, we must reverse the district court's order which enjoin Omaha Service from operating the Omaha Bank's BankAmericard program by charging an interest rate in violation of §48.185. Consistent with the reasoning in the Fisher cases, the Omaha Bank may assess an interest rate to its BankAmericard customers in Minnesota which complies with the applicable Nebraska statutory interest rate. See, Neb. Rev. Stat. §8-820.

Finally, we observe that under the present situation it is the responsibility of the United States Congress to resolve the obvious inequities created. A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to allowable interest rates. The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges.

Reversed.

SHERAN, Chief Justice (concurring specially).

I agree with the result. I do not agree that the public suffers by application of the law in this case where users of credit cards now have a choice between competing suppliers.

SCOTT, Justice (dissenting).

I respectfully dissent. The original purpose of 12 USCA, §85, of the National Bank Act was to prohibit states from discriminating against national banks in favor of local financial institutions. It was intended to put "national banks on an equal footing with the most favored leaders in the state without giving them an unconscionable and destructive advantage over all state lenders." First National Bank in Mena v. Nowlin, 509 F. 2d 872, 80 (8 Cir. 1975). Section 85 thus was intended to insure *intrastate* competitive equality among state lenders and national banks.

The Fisher decisions and the majority of this court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have

rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act.

As the majority opinion states, "The decisions reached in the Fisher cases injected a new attribute into the 'most favored lender status,' which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs." Additionally, should a simple credit card transaction between a local citizen and a local merchant be construed as a bank loan by the Nebraska bank to a Minnesota citizen as Fisher proclaims without question? Minnesota should reject such an extension as a misinterpretation of the National Bank Act[1] and exercise its own judgment. In such matters we are not bound by the Federal circuit court cases but only by holdings of the United States Supreme Court.[2] E.g., United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1076 (7 Cir. 1970).

I would therefore affirm the trial court's issuance of the permanent injunction against Omaha Service prohibiting

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[1]The trial court, in its order of December 22, 1976, stated: "To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic."

[2]"While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, since the state court owes obedience to only one federal court, namely the Supreme Court." 1B Moore, Federal Practice, Par. 0.402[1], p. 65 (2 ed.).

the solicitation of credit card customers in Minnesota as a violation of Minn. St. 48.185.

YETKA, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

WAHL, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

12 U.S.C. §85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the

case of business or agricultural loans in the amount of $25,000 or more, at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

As amended Oct. 29, 1974, Pub. L. 93-501, Title II, §201, 88 Stat. 1558.

Minn. Stat. 48.185 OPEN END LOAN ACCOUNT ARRANGEMENTS. Subdivision 1. Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant to chapter 50, may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card plan, or otherwise under a credit card or overdraft checking plan.

Subd. 2. No bank shall extend credit which would cause the total outstanding balance of the debtor on accounts created pursuant to the authority of this section to exceed $7,500. No savings bank shall extend credit which would cause the outstanding balance of the debtor to exceed $5,000, nor shall it extend such credit for any purposes other than personal, family, or household purposes, nor shall it extend such credit to any person other than a natural person.

Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

(a) Annual charges, not to exceed $15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank;

(b) Charges for premiums on credit life and credit accident and health insurance if:

(1) The insurance is not required by the bank or savings bank and this fact is clearly disclosed in writing to the debtor; and

(2) The debtor is notified in writing of the cost of the insurance and affirmatively elects, in writing, to purchase the insurance.

Subd. 5. If the balance in a revolving loan account under a credit card plan is attributable solely to purchases of goods or services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge shall be charged on that balance.

Subd. 6. This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

(a) that the law of another state shall apply:

(b) that the person consents to the jurisdiction of another state; and

(c) which fixes venue;

is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

Subd. 7. Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required. Costs and attorneys' fees may be allowed to the plaintiff, unless the court directs otherwise. The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

Service of process shall be as in any other civil suit, except that if a defendant in the action is a foreign corporation or a national banking association with its principal place of business in another state, service of process may also be made by personal service outside the state, or in

the manner provided by section 303.13, subdivision 1, clause (3), or in such manner as the court may direct. Process is valid if it satisfies the requirements of due process of law, whether or not defendant is doing business in Minnesota regularly or habitually.

[*1976 c 196 §5*]